instant case, and that the invalidity of the solicitor's notice terminating the appellant's tenancy must necessarily result in dismissal of the claim, since the decision was based on no other grounds.

There is much force in this argument. There clearly was the relationship of landlord and tenant between Ngo Jin and the appellant which was not *ipso facto* determined when Ngo Jin sold a half-interest to the respondent. Nevertheless, subsequent events occurred which materially changed the situation. As the appellant said in his evidence: "I agreed to pay $40 per year as rent (to the previous owner) and repaired the house. Subsequently Ngo Jin become the owner of the land. I paid $5 per month. I paid the $5 per month and then this was increased with the annual assessment of the house. I paid rent right up to the end of 1963." Thus the original rent of $40 per annum paid to Rajendra when the latter was landlord (see Ex.P.13), went up, after Ngo Jin became landlord, to $5 per month and later to $6.60. In view of the rent increase that undoubtedly took place after 1958 the question arises whether or not a new contractual tenancy had supervened when rent was raised by agreement to the higher rate.

This is a material point which appears to have been overlooked by counsel on both sides. After the sale by Ngo Jin of the half-interest to the respondent, rent was in fact raised by a mutual agreement between the appellant and Ngo Jin, to which the respondent was not a party. This fact is established by the rent receipts (Ex.D.14), one of which (Ex.D.14E) showed that on April 23, 1960 the appellant paid Ngo Jin the total sum of $185, being $145 for the period March 1957 to July 1959, and $40 for the period January to April 1960. Rent for the first period ending July 1959 was therefore at the rate of $5 per month, and a higher rent of $6.60 was agreed upon between the appellant and Ngo Jin after 1958, when she had no shadow of right or title to the portion of the house standing on the respondent's land.

I am consequently of the opinion that, even if I am bound to follow *In re Bobington's Tenancy* in holding that the appellant's tenancy at $5 per month continued after 1958 without interruption notwithstanding the transfer of Ngo Jin's half-interest, such tenancy no longer exists after it was replaced by the fresh tenancy at the higher rent. The appellant had pleaded the Control of Rent Ordinance, 1956, in his defence and he had produced evidence which *prima facie* established that the house he occupies was one completed before January 31, 1948 and "premises" within the meaning of the Ordinance. I do not think this is open to dispute. Such being the case, section 6(2) applies, providing that —

> "Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent."

Hence it follows (1) that the appellant, by agreement with Ngo Jin, had accepted the determination by Ngo Jin of his tenancy, at $5 per month which was granted by her before 1958, which tenancy was binding on the respondent when she acquired her half-interest in the land; (2) that the appellant accepted in its place a fresh monthly tenancy from Ngo Jin, comprising not only a portion of Lot No. 15 belonging to herself, but also over a portion of Lot No. 16, of which she had no disposing power whatsoever; (3) that in so far as such fresh tenancy purported to comprise any area outside the boundary of Ngo Jin's own land, it was invalid: *nemo dat quod non habet*, and (4) that the appellant was and has been clearly a trespasser on the respondent's land after July 1959, to whom no notice is required to be given.

Notwithstanding that the premises in question are "premises" within the Control of Rent Ordinance, and that there subsists a relationship of landlord and tenant under the Ordinance as between Ngo Jin and the appellant, there is no such relationship between the respondent and appellant, and the Ordinance has no application.

This appeal is accordingly dismissed with costs and the judgment of the sessions court affirmed.

I notice that the order made in the sessions court has not been drawn up. There will be an order for possession against the defendant (appellant) that he do vacate forthwith from Lot No. 16, town of Kajang, and damages for trespass which I assess at $3.25 per month from August 1, 1959 to April 30, 1962 and at $6.50 per month from May 1, 1962 to April 30, 1965, amounting to $541.25. The order for costs in the sessions court is also affirmed.

Appeal dismissed.

MALAYAN BANKING LTD. v. TING EE NGIENG & ANOR.

[O.C.J. (McGilligan J.) May 12, 1965]

[Sibu — Civil Suit No. 55 of 1964]

Practice and Procedure — Amendment of statement of claim — R.S.C. 1957, O. 28 r. 1.

The plaintiffs applied for amendment of their statement of claim. In the original statement of claim the plaintiffs had alleged that the second defendant had stood as guarantor for the first defendant; they sought to substitute this by stating that the second defendant had stood as guarantor by a letter of guarantee in writing.

Held: the application for amendment should be allowed as —

(a) it was made *bona fide;*

(b) it would not if made turn the suit into one of a different and inconsistent nature; and

(c) it would not cause injustice to or prejudice the other party.

Case referred to:—

(1) *Looi Guan Kway* v. *Low Lean Bok,* [1938] M.L.J. 35.

CIVIL SUIT.

C. T. Wong for the plaintiffs.

A. F. H. Crawshaw for the second defendant.

McGilligan J.: The plaintiffs have through their advocate applied at this stage, on the day fixed for hearing but before any evidence has been taken, to amend their statement of claim. Paragraph 3 of the existing statement of claim (that dated 17th September 1964) reads:—

"3. The second defendant as from the 10th day of June 1963 stood as guarantor for the first defendant to the extent of $30,000".

The plaintiffs ask to amend by (a) substituting for that paragraph 3 the following paragraph:—

"3. By a letter of guarantee in writing dated 10th day of June, 1963 signed by the second defendant, he (the 2nd defendant) stood as a guarantor for the first defendant to the extent of $30,000".

and (b) altering the figure for interest in paragraph 5(c) from 8% to 12%.

The first defendant does not object to these amendments.

The second defendant, through his advocate, has objected to the first proposed amendment. He does not object to the second.

The court has heard well reasoned arguments from both advocates, and is indebted to them for their assistance.

The court has been referred to Order 28 rule 1 and to Order 19 rule 16.

I do not consider that Order 19 rule 16 applies to this case. What it means is that later pleadings, such as a reply, must not be inconsistent with earlier pleadings. It is specifically not applicable where amendments are made, or asked to be made.

The decision here therefore turns on the meaning and effect of Order 28 rule 1. That rule 1 reads as follows:—

"The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings, in such manner and as such terms as may be just and all such amendments shall be made as may be necessary for determining the real questions in controversy between the parties."

In *Mallal's* 'Supreme Court Practice' at page 342 the general principle is stated to be that the court will allow such amendments as will cause no injustice to the other side. It is also said, quoting from the case of *Looi Guan Kway* v. *Low Lean Bok* [1] that to determine whether injustice would or would not result a court will ask the following three questions:

(1) Is the application for amendment made *bona fide?;*

(2) Will the amendments asked for cause no prejudice to the other side which cannot be compensated by costs?;

(3) Are the amendments asked for such as to turn a suit of one character into a suit of another and inconsistent character?

I am satisfied that these are the questions a court should ask itself in such an application as this for amendment of pleadings, and I believe it fair to say that both advocates agree.

First, it is certain that there is no question of *mala fides* here; and it is not alleged by the second defendant.

Second, the amendment asked for would not, if made, turn this into a suit of a different and inconsistent nature. On the statement of claim as it is the second defendant is being sued as a guarantor; on it as it would be if amended he is also being sued as a guarantor.

Would then, this amendment asked for prejudice the second defendant in a way which cannot be compensated for by costs? Would it (in the words used in paragraph 72, page 35, of volume 30 of the 3rd Edition of *Halsbury*) remove an immunity conferred by the earlier omission? (I take it to be the second defendant's basic argument that this amendment would remove such an immunity). Would the proposed amendment, if made, deprive the second defendant of a defence he now has under the Statute of Frauds? In other words, has the second defendant, on paragraph 3 of the statement of claim as it now stands a defence under the Statute of Frauds of which he could not avail himself if the proposed amendments were made?

If the answer to the last question (to all the questions put in the last paragraph) is YES, the plaintiffs' pleadings, as they stand, must be taken to allege, or imply, only an oral contract of guarantee unsupported by any written agreement or memorandum.

The advocate for the second defendant referred to the following statement in the same volume 30 of *Halsbury* in paragraph 23 on pages 11 and 12:—

"In pleading a contract it must be stated whether it is express or implied. If the contract is express, it must be shown whether the contract is oral or in writing, and if the contract, or any part of it, is in writing, the document or documents must be identified."

Unfortunately the cases cited in the footnotes to the passage just quoted are not available to me, but I accept it to be a correct statement of the law and of the requisite procedure.

It follows from that passage that the plaintiffs' statement of claim is, in paragraph 3, faulty, is not sufficiently explicit and detailed, and requires amendment. However, I consider it would be wrong to find that the present paragraph 3 must be taken to allege an oral guarantee. It specifies neither an oral nor a written guarantee. The passage from *Halsbury* just quoted says that it must be stated in pleadings whether a contract is oral or in writing; these pleadings say nothing as to which it is. It can then just as well be argued that because it is not said to be oral it must be taken to be in writing, as that because it is not said to be in writing it must be taken to be oral.

It is my opinion and judgment, accordingly, first, that the second defendant was not entitled to presume from the wording of the present paragraph 3 that the plaintiff was alleging only an oral guarantee, and would put forward no written evidence of the guarantee alleged, and second, that the proposed amendment, if made, will not deprive him of an immunity he had and will not deprive him of a defence available to him on the pleadings as they stand.

To return now to Order 28 rule 1, it does seem to me that the amendment of paragraph 3 asked for is necessary for the purpose of determining the real question in controversy between the parties, that is — in this matter — between the plaintiff and the second defendant. I may add that the passage quoted from paragraph 23 of volume 30 of *Halsbury* goes to show that some such amendment as this must be made for the pleadings to be in order. In fact the second defendant might well have asked for further and better particulars of what is stated in paragraph 3.

The plaintiffs' application for amendments is allowed, and the statement of claim is amended accordingly.

Application allowed.

YONG KUAN TEIK v. DEVAN NAIR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) May 13, 1965]

[K.L. — Federal Court Civil Appeal No. 95 of 1964]

Election — Petition — Failure to comply with rule requiring service of notice of presentation of election petition within ten days — Whether mandatory — Jurisdiction to strike out petition — Election Offences Ordinance, 1954 Part VII — Election Petition Rules, 1954.

This was an appeal from the decision of the judge who struck out an election petition on the ground that the provisions of rule 15 of the Election Petition Rules, 1954, which require service of notice of the presentation of the petition within ten days, had not been complied with ([1964] M.L.J. 456).

Held: (1) the trial judge had no power to strike out the petition for non-compliance with rule 15 of the Election Petition Rules, 1954, as there was nothing in the Election Offences Ordinance, 1954, or the rules which gave him power to do so;

(2) the rules, particularly those dealing with the disposal of election petitions, are more clearly analogous to rules relating to the performance of a public duty than to rules affecting the rights and obligations of individuals and as such are to be treated as directory and not as of such a nature that non-compliance with them affects the validity of acts done.

Cases referred to:—

(1) *Williams* v. *Tenby Corporation* (1879) L.R. 5 C.P.D. 135.

(2) *Goonesinha* v. *de Kretser* [1945] A.C. 63.

(3) *Coppock* v. *Bower* 4 M. & W. 361, 366.

(4) *Theberge* v. *Laudry* (1876-7) 2 App. Cas. 102, 106.

(5) *Strickland* v. *Grima* [1930] A.C. 285, 296.

(6) *Hartlepool Election Petition* (1869) 19 L.T. 821, 822.

(7) *County of Durham (North Division) Election Petitions* (1874) 31 L.T. 321.

(8) *Montreal Street Railway Co.* v. *Normandin* [1917] A.C. 170, 175.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

Yong Pung-How for the respondent.

Thomson L.P.: This is an appeal from a decision of the High Court at Seremban whereby an election petition under the Election Offences Ordinance, 1954, was ordered to be struck out.

The matter arises out of the Parliamentary Election held last year. The petitioner, the present appellant, is a person who voted in the election for the Bungsar constituency in Kuala Lumpur at which the present respondent was returned as duly elected.

The result of the election was published in the *Gazette* on 11th June, 1964 (Notification No: 2234) and on 29th June, 1964, that is within the period of 21 days prescribed by section 38(1) of the Election Offences Ordinance, the appellant filed an election petition asking that it be determined whether or not the respondent was duly elected or returned on the ground that at the time of the election he was not a citizen of Malaysia. And here I would pause to observe with all possible emphasis that at no time has there been any shadow of a suggestion of any impropriety on the part of the respondent or his supporters.

The respondent after his return had not furnished the Registrar of the High Court with an address for service, which he is permitted but not required to do under rule 10 of the Election Petition Rules, and on ascertaining this fact the appellant proceeded to serve notice of the presentation of the petition under the provisions of rule 15 of the Rules by publication in the *Gazette*. That notice which was dated 13th